

2006

State of Utah v. Alfredo Gutierrez : Brief of Appellant

Utah Court of Appeals

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FILED
UTAH APPELLATE COURTS
NOV 09 2006

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

ALFREDO GUTIERREZ,

Defendant/Appellant.

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Appeal No. 20060544-CA

Trial Court No. 051100099

BRIEF OF APPELLANT

Attorney for Defendant/Appellant

Attorney for Plaintiff/Appelle

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JURISDICTION.

This Court has jurisdiction in this matter under Utah Code Ann. § 78-2a-3(2)(e).

ISSUES PRESENTED FOR REVIEW **AND STANDARD OF REVIEW**

Issue No. 1: Did the police officer's request to search Gutierrez's person violate Article I, Section 14 of the Utah Constitution because it exceeded, without reasonable suspicion, the scope and purpose of the traffic stop?

Standard Of Review: "In search and seizure cases, no deference is granted to . . . the district court regarding the application of law to underlying factual findings." *State of Utah v. Alvarez*, 2006 UT 61, ¶8. Constitutional issues are questions of law reviewed for correctness. *State of Utah v. Curry*, 2006 UT App. 390, ¶ 5.

Issue No. 2: Did the police officer's Terry Frisk of Gutierrez violate Article I, § 14 of the Utah Constitution where he lacked reasonable suspicion that Gutierrez was armed and presently dangerous?

Standard of Review: Constitutional issues are questions of law reviewed for correctness. *State of Utah v. Curry*, 2006 UT App. 390, ¶ 5.

Issue No. 3: Did Gutierrez consent to the search of his person where his consent was not voluntary and it resulted from Officer Gerfen's exploitation of Gutierrez's illegal detention?

Standard of Review: Constitutional issues are questions of law reviewed for correctness. *State of Utah v. Curry*, 2006 UT App. 390, ¶ 5.

Issue No. 4: Was the trial court's factual conclusion finding the beer bottle in

Gutierrez's car contained alcohol clearly erroneous when the record is void of any evidence that the bottle still contained beer at the time of its discovery?

Standard of Review: The finding of facts underlying a trial court's decision to grant or deny a motion to suppress is reviewed under the clearly erroneous standard. *State v. Warren*, 2003 UT 36, ¶ 12, 78 P.3d 590,

Issue No. 5: Was the search of Gutierrez incident to a lawful arrest for an open container violation when the statute only applies to containers that contain an alcoholic beverage and there is no evidence that the beer bottle discovered in Gutierrez's car still contained beer?

Standard of Review: Constitutional issues are questions of law reviewed for correctness. *State of Utah v. Curry*, 2006 UT App. 390, ¶ 5.

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, AND ORDINANCES.**

Utah Constitution, Article I, § 14,

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or things to be seized.

Utah Code Ann. § 41-6a-526,

Drinking alcoholic beverages and open containers in motor vehicle prohibited – Definitions – Exceptions.

(1) As used in this section:

(a) "Alcoholic beverage" has the same meaning as defined in Section 32A-1-105.

(b) "Chartered bus" has the same meaning as defined in Section 32A-1-105.

(c) "Limousine" has the same meaning as defined in Section 32A-1-105.

(d)(i) "Passenger Compartment" means the area of the vehicle normally

occupied by the operator and passengers.

(ii) "Passenger Compartment" includes areas accessible to the operator and passengers while traveling, including a utility or glove compartment.

(iii) "Passenger Compartment" does not include a separate front or rear trunk compartment or other area of the vehicle not accessible to the operator or passengers while inside the vehicle.

(2) A person may not drink any alcoholic beverage while operating a motor vehicle or while a passenger in a motor vehicle, whether the vehicle is moving stopped, or parked on a highway.

(3) A person may not keep, carry, possess, transport, or allow another to keep, carry, possess, or transport in the passenger compartment of a motor vehicle, when the vehicle is on any highway, any container which contains any alcoholic beverage if the container has been opened, its seal broken, or the contents of the container partially consumed.

(4) Subsections (2) and (3) do not apply to a passenger:

(a) in the living quarters of a motor home or camper;

(b) who has carried an alcoholic beverage onto a limousine or chartered bus that is in compliance with subsections 32A-12-213(3)(b) and (c); or

(c) in a motorboat or on waters of this state as these terms are defined in Section 73-18-2.

(5) Subsection (3) does not apply to passengers traveling in a licensed taxicab or bus.

STATEMENT OF CASE

Nature Of The Case.

Gutierrez appeals the trial court's denial of his motion to suppress evidence under Article I, § 14 of the Utah Constitution. This case, at its essence, questions whether the police violated Gutierrez's rights as guaranteed by Article I, Section 14 when, following a traffic stop, the police requested consent to search Gutierrez without reasonable suspicion that he was armed or dangerous, or otherwise possessed contraband on his person. During the search the police discovered a pipe with methamphetamine residue inside the hooded sweatshirt worn by Gutierrez.

The State contends that at each phase of the encounter, from the traffic stop to the

seizure of contraband, the police acted with reasonable suspicion, or in the alternative the search was incident to a valid arrest. Gutierrez contends the police request to search his person for anything illegal impermissibly deviated from the original purpose of the traffic stop without reasonable suspicion that Gutierrez was armed and dangerous, or otherwise possessed contraband.

Course Of The Proceedings Below.

Gutierrez was charged with “Possession or Use of a Controlled Substance in a drug free zone” a second degree felony in violation of Utah Code Ann. § 58-37-8(2)(a)(i), “Possession of Drug Paraphernalia in a drug free zone” a class A misdemeanor in violation of Utah Code Ann. § 58-37a-5(1), “Speeding” a class C misdemeanor in violation of Utah Code Ann. § 41-6-46, and “Following Too Close” a class C misdemeanor in violation of Utah Code Ann. § 41-6-62(1). (Information, R. 1-2). A preliminary hearing was held on June 1, 2005. (Preliminary Hearing Transcript, R. 118). Officer Gerfen was the only witness called to testify by the State. (Id.) Following the preliminary hearing Gutierrez was bound over by the trial court. (Id. at 7:17-22).

Gutierrez subsequently filed a motion to suppress evidence challenging the search of his person by Officer Gerfen. (Motion to Suppress, R. 36-40). In his motion Gutierrez raised two issues. First, the search of his person violated both the Fourth Amendment of the United States Constitution and Article I, § 14 of the Utah Constitution because at the moment Officer Gerfen requested consent to search he exceeded the scope of the traffic stop. (Mot. Suppress, R. 37). Second, Utah Code Ann. § 77-7-24 precluded the State from availing itself of the inevitable discovery doctrine. (Id.) A hearing on the motion

was held on August 15, 2005. (Motion to Suppress Hearing Transcript, R. 120). At the conclusion of the hearing the trial court issued its oral ruling from the bench finding Gutierrez consented to the search of his person, and the discovery of the methamphetamine rendered Gutierrez's argument under Utah Code Ann. § 77-7-24 moot. (Prelim. Tr., R. 120, at 8:22-25, 9:4-18).

The State, at the request of the trial court, prepared the proposed findings of facts and conclusions of law. Gutierrez objected to the findings as exceeding the scope of the trial court's oral ruling because they also claimed the search was incident to a lawful arrest. (Objection to Findings of Facts, R. 54). In a subsequent memorandum decision the trial court overruled Gutierrez's objection ruling that the proposed findings comported with its prior oral ruling. (Memorandum Decision 10/17/05, R. 61). The trial court subsequently signed the Findings of Facts and Conclusions of Law ("Findings of Facts") as prepared by the State. (Findings of Fact, R. 63-65). Gutierrez then filed a motion for rehearing on the motion to suppress to specifically address the trial court's conclusion that the search was incident to a lawful arrest. (Motion for Rehearing, R. 68-69). The trial court denied the motion for rehearing. (Id.)

Gutierrez then filed a petition for interlocutory appeal. The Court of Appeals subsequently issued an order denying Gutierrez permission to appeal the trial court denial of his motion to suppress. (Utah Court of Appeals Order, R. 78). On March 27, 2006 Gutierrez entered conditional guilty pleas to one count of "Illegal Possession of a Controlled Substance," a third degree felony and "Use or Possession of Drug Paraphernalia, a class A misdemeanor. (Minute Entry 3/27/06, R. 89). Gutierrez,

pursuant to his plea agreement with the State, preserved his right to challenge the denial of his motion to suppress. Sentence was imposed against Gutierrez on May 9, 2006. (R. 106-109). On June 8, 2006, Gutierrez filed his Notice of Appeal. (R. 104).

Disposition In The Court Below.

The trial court denied Gutierrez's motion to suppress. It determined that the initial traffic stop was legal and premised on observed traffic violations. Once the officers observed the open container of alcohol in the vehicle they had the right to determine if Gutierrez was impaired. The request to search was therefore legitimate because it occurred during the period the officers were entitled to investigate the open container violation and because consent was granted. After the denial of his motion to suppress Gutierrez entered a conditional plea of guilty thereby preserving his right to appeal his motion.

STATEMENT OF THE FACTS
RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Brigham City Police Officer Travis Gerfen (Officer Gerfen) observed Gutierrez traveling southbound in Brigham City, Utah. (Prelim. Hr'g Tr, R. 118, at 2:18-25, 3:6-8). To Officer Gerfen it appeared Gutierrez was following a second vehicle too close. (Id. at 3:8-10). After following Gutierrez a short distance Officer Gerfen used his radar to determine he was traveling 52 mph in a 35 mph zone. (Id. at 3:10-13). Based on the speeding violation Officer Gerfen initiated a traffic stop of Gutierrez. (Id. at 3:13). The traffic stop occurred across the street from the Brigham City Police department during daytime hours. (Id. at 3:19).

Officer Gerfen approached Gutierrez from the drivers side window and requested and obtained a valid drivers license and registration from Gutierrez. (Id. at 3:20-21, 5:1-9). At about this same a second officer arrived to assist Officer Gerfen. (Id. at 21-22). The second officer approached the passenger side window and told Officer Gerfen that he could see an open bottle of beer by the drivers side window. (Id. at 21-24). Officer Gerfen instructed Gutierrez to exit the car (Id. at 3:24-25). Officer Gerfen than asked Gutierrez if he was drinking. (Id. at 3:25). According to Officer Gerfen, Gutierrez admitted to having one beer. (Id. at 4:2)

On cross examination Officer Gerfen acknowledged that he did not administer field sobriety tests to Gutierrez because did not appear intoxicated. (Id. at 5:24-25, 6:1, 4-6). He also acknowledged that there was no reason to arrest him for driving under the influence of alcohol. (Id. at 6:2-3). And Officer Gerfen did not offer any evidence that he smelled alcohol on either Gutierrez's or his passenger.

Because Gutierrez admitted to drinking, Officer Gerfen asked him if he could search his person for anything illegal. (Id. at 4:4-5). During the search Officer Gerfen he found a methamphetamine pipe inside a stocking cap that he removed from Gutierrez sweatshirt. (Id.) Officer Gerfen then arrested Gutierrez for possession of methamphetamine and paraphernalia. (Id. at 4:9-10).

Officer Gerfen, when asked on cross-examination why he wanted to search Gutierrez, explained, "If I pull somebody out on a traffic stop, if they've been drinking or if I believe they're in the process of committing a crime, I'll search them if they give me permission." (Id. at 519-23). Officer Gerfen also acknowledged that he could not recall if

he returned Gutierrez's license and registration before requesting consent to search him. (Id. at 7-11).

SUMMARY OF ARGUMENT

Officer Gerfen violated Gutierrez right to be free from unreasonable searches and seizures as guaranteed by Article I, § 14 when he asked Gutierrez if he could search his persons. The discovery of the beer bottle in Gutierrez car, following a valid traffic stop, created a reasonable suspicion that Gutierrez was intoxicated or had violated the open container statute. Officer Gerfen, however, was constitutionally obligated to pursue a means of investigation that would quickly confirm or dispel these possible criminal violations. The request to search Gutierrez, however, fell outside his expanded authority to investigate. Officer Gerfen simply lacked a reasonable articulable suspicion that Gutierrez was armed and dangerous, that he had an open container on his person, or that the search would otherwise disclose information that would diligently confirm or dispels any concern that Gutierrez was intoxicated or violated the open container statute.

The search of Gutierrez was also not a valid search under the Terry Doctrine. A traditional Terry frisk required Officer Gerfen to have a reasonable articulable suspicion that Gutierrez was armed or dangerous. There is no evidence in the record, however, to support this conclusion. Instead, by Officer Gerfen's own admission, he requested consent to search as a matter of practice rather than any particular concern or belief that Gutierrez was concealing a weapon.

Gutierrez's consent to search was obtained through duress and coercion and the exploitation of Officer Gerfen's prior illegal conduct. Under the totality of the

circumstances the State cannot meet its burden of proving by a preponderance of the evidence that Gutierrez's consent was voluntary. Gutierrez was never informed that he could refuse the request. At the time the request was made Officer Gerfen still possessed Gutierrez's drivers license and registration so that he was not free to leave. And the request was made immediately after Gutierrez was ordered out of the car. Taken together the State cannot prove Gutierrez will was not overborne or his capacity for self determination was not critically impaired.

Furthermore, Gutierrez's consent was obtained through Officer Gerfen exploitation of the illegal detention. When conducting an exploitation analysis the court evaluates the relationship between the police misconduct and the illegally obtained evidence to determine if excluding the evidence will effectively deter future illegalities. Officer Gerfen admitted that it is his practice to ask for consent to search whenever he removes a driver from their vehicle regardless of his constitutional obligation to strictly tie his investigatory questioning to the facts and circumstances that justified the stop in the first place. This demonstrates that Officer Gerfen engages in the illegal questioning for the primary purpose of exploiting his misconduct to gain consent to search. Officer Gerfen's purpose of exploiting his misconduct also demonstrates a direct connection between his misconduct and Gutierrez's consent. Suppressing the evidence derived from the illegal detention would serve to deter future misconduct. In addition the record is void of any intervening circumstances that created a clean break between the chain of events connecting the misconduct to Gutierrez's consent. Finally, the temporal proximity between the illegal detention and Gutierrez's consent was negligible and strongly

indicates exploitation because the effects of the misconduct have not had time to dissipate.

The trial court's finding that the beer bottle contained alcohol was clearly erroneous. The only facts entered into the record regarding the beer bottle were provided by Officer Gerfen. They included to three specific facts, (1) Officer Gerfen learned from an assisting officer that there was an open beer bottle on the drivers side, (2) the assisting officer observed the bottle while standing next to the passenger side window, (3) Officer Gerfen stated that "*if he had an open container in his vehicle*, I generally don't write citations for that." In contrast, there is no evidence that Officer Gerfen attempted to examine the bottle to determine if it was empty or it contained alcohol. Gutierrez was never cited for an open container violation. Officer Gerfen did not claim he smelled alcohol on either Gutierrez or his passenger's breath. Gutierrez did not appear intoxicated and he was not subjected to field sobriety tests. Finally, Officer Gerfen stated that his decision to arrest Gutierrez stemmed from the illegal discovery of methamphetamine and not from the beer bottle discovered in the car.

Finally, the search of Gutierrez was not a search incident to a valid arrest. To fall within this exception to the warrant requirement the State has the burden of proving (1) the arrest was lawful, (2) the search was in the area of the suspect's immediate control, and (3) the search was contemporaneous to the arrest. Gutierrez concedes that the State can satisfy the second and third prongs. The real question in this case is if the arrest of Gutierrez was lawful. The open container statute prohibits the transportation of an alcoholic container if it still contains alcohol, the container has been opened, its seal

broken, or the contents partially consumed. In this case there is no evidence in the record to suggest Officer Gerfen examined the beer bottle to determine if any of its contents remained. As noted above he did not claim to detect odor on the breath of either Gutierrez or his passenger. Gutierrez did not appear intoxicated, and there was no evidence that Officer Gerfen observed any physical indications that either individual was drinking beer in the car.

The above considerations establish that Officer Gerfen violated Gutierrez rights guaranteed by Article I, § 14 of the Utah Constitution. The Court of Appeals must reverse the trial court's denial of Gutierrez motion to suppress.

ARGUMENT

I. OFFICER GERFEN'S REQUEST TO SEARCH GUTIERREZ VIOLATED ARTICLE I, §14 BECAUSE IT EXCEEDED, WITHOUT REASONABLE SUSPICION, THE SCOPE AND PURPOSE OF THE TRAFFIC STOP.

Article I, Section 14 provides, “the right of the people to be secure in their persons, house, papers and effects against unreasonable searches and seizures shall no be violated; . . .” Utah Const. Article I, Section. 14. This right prohibits a police officer from stopping a vehicle unless he has reasonable suspicion the driver has committed a crime. *State v. Hansen*, 2002 UT 125, 63 P.3d 650. Once a traffic stop is made the officers authority to question the driver must remain tightly moored to the conduct that justified the stop in the first place. *Id.* at ¶ 29. This means the officer's investigatory authority is strictly limited to requesting a valid drivers license and registration, conducting a warrants check, and issuing a citation. *Id.* at 31. The officer must then

allow the driver to depart. *Id.* Any investigation beyond the original purpose of the traffic stop must be supported by reasonable suspicion of further criminal activity. *Id.* Absent new evidence the expanded investigation is illegal. *Id.*

Even when faced with additional evidence of criminal activity the police are constitutionally obligated to diligently pursue a means of investigation that quickly confirms or dispels the officer's new suspicions. *State v. Lafond*, 2003 UT App. 101, ¶ 14, 68 P.3d 1043. The new investigation must further remain strictly tied to the facts and circumstances giving rise to the officer new suspicions. *Id.* Failure to do so renders the expanded investigation illegal. *Hansen*, 2002 UT 125, ¶ 31.

A traffic violation committed in presence of a police officer is a constitutionally sufficient basis for stopping a driver. *Id.* at 30. In the present case Officer Gerfen stopped Gutierrez for speeding. (Prelim. Hr'g Tr., R. 118, at 3:10-13). Once Officer Gerfen observed the traffic violation he possessed the reasonable suspicion necessary to stop Gutierrez. *Hansen*, 2002 UT 125, ¶ 30. His authority to seize and detain Gutierrez, however, was strictly limited to performing those acts necessary to request a valid driver's license and registration, conduct a warrants check and issue the citation for the observed traffic violations. *Id.* at ¶ 31. Shortly after the traffic stop, however, an assisting officer noticed a beer bottle inside the vehicle. (Prelim. Hr'g Tr., R. 118, at 3:21-24). This newly observed evidence expanded Officer Gerfen's authority and permitted him to investigate both the presence of the container and whether Gutierrez was driving while intoxicated.

Officer Gerfen, however, was constitutionally obligated to pursue a means of

investigation that would quickly dispel or confirm whether Gutierrez violated the open container statute or whether he was driving while intoxicated. *State v. Lafond*, 2003 UT App. 101, ¶ 14 Officer Gerfen nevertheless ignored his constitutional obligations and instead immediately asked Gutierrez if he could search his person. (Prelim. Hr’g Tr., R. 118, at 3: 21-25, 4:1-5). Later during the preliminary hearing, when asked why, Officer Gerfen simply explained, “if I pull somebody out of a traffic stop, if they’ve been drinking or if I believe they’re in the process of committing a crime, I search them if they give me permission to.” (*Id.* at 5:19-23). By Officer Gerfen’s own admission his request to search was made as a matter of general practice and not because of some reasonable articulable concern that Gutierrez possessed contraband, or posed a threat to Officer Gerfen’s safety.

The absence of reasonable articulable suspicion is further illuminated by the totality of facts and circumstance confronting Officer Gerfen, and his reaction to those facts. Regarding any fear that Gutierrez was driving while intoxicated, Officer Gerfen admitted in his testimony that he did not administer field sobriety tests to Gutierrez because he did not appear intoxicated. (*Id.* at 6:1-6).

Confronted with a possible open container violation, Officer Gerfen did nothing to diligently dispel or confirm that concern. Pursuant to Utah Code Ann. § 41-6a-526, the open container statute, “ a person may not keep, carry, possess, transport . . . in the passenger compartment of a motor vehicle, when the vehicle is on any highway, any container ***which contains any alcoholic beverage*** if the container has been opened, its seal broken, or the contents of the container partially consumed. *Id.* at (3)(***emphasis***

added). The statute, when read as a whole, requires that the container actually contain alcohol and it does not prohibit the transportation of empty beer bottles, cans or other empty alcohol containers. To construe the statute otherwise would cause undesired results such as dissuading the collection of litter, or the recycling of bottles and cans.

In his testimony Officer Gerfen admitted to learning of the beer bottle from an assisting officer, who in turn observed the bottle in the driver side compartment while standing at the passenger side window. (Prelim. Hr'g Tr., R. 118, at 3:19-24). There is nothing in the record, however, that demonstrates Officer Gerfen, or the assisting officer, examined the bottle to determine if it contained alcohol. Instead, Officer Gerfen immediately asked Gutierrez if he could search his person. (*Id.* at 3:24-25). Yet the record is void of any facts articulated by Officer Gerfen that explain how searching Gutierrez would assist him in determining whether he violated the open container statute.

II. OFFICER GERFEN' SEARCH OF GUTIERREZ WAS NOT JUSTIFIED UNDER THE TERRY DOCTRINE BECAUSE HE LACKED REASONABLE SUSPICION THAT GUTIERREZ WAS ARMED OR OTHERWISE POSED A THREAT TO OFFICER SAEFTY.

Officer Gerfen's search of Gutierrez was not justified under the Terry Doctrine. "Traditional *Terry* Frisk requires that the officer have reasonable, articulable suspicion the suspect is armed and dangerous." *State v. Brake*, 2004 UT 95, ¶ 32, 103 P.3d 699. The Terry Doctrine grew from the need to balance society's interest in promoting officer safety against its interest in protecting individual liberty from arbitrary police actions. *State v. Warren*, 2003 UT 36, ¶ 25, 78 P.3d 590. There is, without doubt, an inherent danger in all traffic stops. *Id.* at ¶ 23. The Utah Supreme Court acknowledged, however,

this “danger can be fully or partially mitigated by ordering the occupants out of the vehicle.” *Id.* at ¶ 22. This slight intrusion on individual liberty, even in the absence of reasonable suspicion, is justified in order to allow the police officer to operate in safety. *Id.* at ¶¶ 24-25.

In contrast, “a Terry frisk is an intrusion of greater magnitude” that “may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.” *Id.* at ¶ 25. A Terry frisk is therefore prohibited unless the police officer possesses reasonable articulable facts that “lead a reasonable person to believe the suspect may be armed and presently dangerous.” *Id.* at ¶ 29. In *Brake* the Utah Supreme Court further explained that for crimes “such as trafficking in small quantities of narcotics, possession of marijuana, underage drinking, driving under the influence and lesser traffic offenses . . . there must be particular facts that lead the officer to believe the suspect is armed.” *State v. Brake*, 2004 UT 95, ¶ 32 (quoting *State v. Warren*, 2001 UT App. 346, ¶ 15, 37 P.3d 270).

Applying these principles to the present case, the record clearly shows Officer Gerfen’s search of Gutierrez was not justified. Gutierrez was stopped for minor traffic violations and upon the discovery of the beer bottle was immediately ordered out of his vehicle. (Prelim. Hr’g Tr., R. 118, at 3:21-25). Any inherent danger of the traffic stop itself was at least partially, if not fully, mitigated by Gutierrez exit from his car. *State v. Warren*, 2003 UT 36, ¶ 22

Once Gutierrez was outside his car the nature of the crimes required Officer Gerfen to have particular facts that would lead him to believe Gutierrez was armed and

presently dangerous. *Id.* at ¶ 29. The record is void of the required facts. Instead Officer Gerfen explained that his desire to search Gutierrez was based solely on Gutierrez's admission to drinking a beer. (Prelim. Hr'g Tr., R. 118, at 4:4-5). Officer Gerfen also testified that the focus of his search was not weapons but "anything illegal" Gutierrez might possess. (*Id.*)

Absent from the record is also any indication that Gutierrez was acting aggressive or threatening. There is no allegation that Officer Gerfen noticed any weapons in the car, or any bulge or object on Gutierrez's person that suggested he possessed a weapon of any kind. When considered with the fact that the traffic stop occurred across the street from the Brigham City Police Station during daylight hours, Officer Gerfen simply had no basis to form a reasonable articulable suspicion that Gutierrez was armed and presently dangerous. (*Id.* at 3:19-20).

It instead appears that Officer Gerfen engaged in a pattern and practice of asking consent to search the drivers during his traffic stops. When asked why he wanted to search Gutierrez, Officer Gerfen explained, "if I pull somebody out on a traffic stop, if they've been drinking or I believe they are in the process of committing a crime, I'll always search them if they give me permission to." (*Id.* at 5:21-25). This practice was specifically rejected by the Utah Supreme Court as impermissible investigative questioning the unconstitutionally expanded the scope of the traffic stop. *State v. Hansen*, 2002 UT 125, ¶ 32, 63 P.3d 650.

In *Hansen* the arresting officer stopped Hansen for an illegal lane change and lack of insurance. *Id.* at ¶ 6. Once the officer determined that Hansen's drivers license and

registration were current he returned the documents to Hansen with a warning to obtain car insurance. *Id.* at ¶ 12. Before letting Hansen leave, however, the officer asked him if “he had any alcohol, drugs, or weapons in the car.” *Id.* at ¶ 13. When Hansen replied “no” the officer asked permission to search the vehicle. *Id.* During the motion to suppress hearing the officer conceded he lacked reasonable suspicion that Hansen was committing some additional crime. *Id.* at ¶ 32. The officer instead admitted, “it’s my practice to ask them for consent” to search the car. *Id.* at ¶ 14. On review the Utah Supreme Court determined that once the officer started questioning Hansen about alcohol and drugs the officer had “exceeded, without justification, the purpose of the initial traffic stop.” *Id.* at ¶ 32. Hansen’s continued detention was subsequently illegal. *Id.*

III. GUTIERREZ DID NOT CONSENT TO THE SEARCH.

Valid consent requires that (1) the consent was given voluntarily, and (2) the consent was not obtained by police exploitation of the prior illegal detention. *Id.* at ¶ 47. Ruling on Gutierrez’s motion to suppress the trial court concluded that Gutierrez consented to the search by Officer Gerfen. The question of voluntary consent is a legal conclusion reviewed for correctness. *Hansen*, 2002 UT 125, ¶ 51. Similarly, determining if consent was obtained by exploiting the prior illegal detention is a legal conclusion that is also reviewed for correctness. *Id.* at 61.

A. Gutierrez’s Consent Was Not Voluntary.

“When the State attempts to prove that there was voluntary consent after an illegal detention, it has a much heavier burden to satisfy than when consent is given after a permissible detention. *Id.* at ¶ 51. Relying on the totality of the circumstances the State

must prove voluntary consent by a preponderance of the evidence. *Id.* ¶ 56. This requires the State to prove Gutierrez consented without duress or coercion, that his will was not overborne or his capacity for self determination was not critically impaired. *Id.* at ¶ 57.

Duress or coercion may be demonstrated by a defendant's low intelligence, evidence of minimal school, lack of any effective warnings about his rights and the timing of the requests to search. *Id.* A lack of duress or coercion may be demonstrated by (1) the absence of a claim of authority, (2) the absence of an exhibition of force, (3) a mere request to search, (4) cooperation by the defendant, (5) the absence of deception or trick by the officer. *Id.*

Applying these factors, Gutierrez did not receive any warnings about his right to refuse the search. (Prelim. Hr'g Tr., R. 118, at 4:4-5). The request was made immediately after he was ordered out of the car. (*Id.* at 3:24-25, 4:1-5). This timing strongly implied he was not free to refuse the officer's request to search. At the time the request was made, Officer Gerfen still had Gutierrez's drivers license and registration in his possession. (*Id.* at 4:25, 5:1-9, 6:7-16). By retaining these documents Officer Gerfen demonstrated force and authority over Gutierrez since he was not otherwise free to leave. Officer Gerfen's authority to prohibit Gutierrez from leaving also implied the authority require Gutierrez to remain at the scene until he gave consent to search.

On the other hand, there is no indication in the record that Officer Gerfen used deception or trickery to gain consent. Gutierrez is seemingly a person of average intelligence with a more than minimal schooling. There is no evidence in the record to suggest the request to search was anything more than a request. Nevertheless, the State,

in consideration of the totality of the circumstances, cannot prove by a preponderance of the evidence that Gutierrez's consent was voluntary.

B. Gutierrez's Consent Resulted From The Police Exploitation Of His Illegal Detention.

“When conducting an exploitation analysis, a court evaluates the relationship between official misconduct and subsequently discovered evidence to determine if excluding the evidence will effectively deter future illegalities.” *State v. Hansen*, 2002 UT 125, ¶ 62. The purpose is to “compel respect for the constitutional guaranty . . . by removing the incentive to disregard it.” *Id.*

Relevant factors include “(1) the purpose and flagrancy of the illegal conduct, (2) the presence of intervening circumstances, and (3) the temporal proximity between the illegal detention and consent.” *Id.* at ¶ 64. “The purpose and flagrancy factor directly relates to the deterrent value of the suppression.” *Id.* at ¶ 65 “The need for deterrence is strongest where criminal sanctions against the defendant may result.” *Id.* at ¶ 63. When an officer engages in illegal conduct for the purpose of obtaining consent then suppression of the illegally obtained evidence will clearly have a deterrent effective. *Id.* at ¶ 65.

Applying these considerations in *Hansen*, the Supreme Court concluded the officer's overriding “purpose of the illegal detention was to exploit the opportunity to ask for consent.” *Id.* at ¶ 66. Similarly, Officer Gerfen admitted that it is his practice to ask for consent to search whenever he removes a driver from his vehicle. (Prelim. Hr'g Tr., R. 118, at 5:21-23). He employed this practice against Gutierrez and requested consent

to search even in the absence of reasonable suspicion. These facts demonstrate that, like the officer in *Hansen*, Officer Gerfen engages in the illegal detention for the primary purpose of exploiting the opportunity in order to gain consent.

In *Hansen* the Supreme Court also concluded that the officer's objective to exploit the illegal detention demonstrated a direct connection between the officer's misconduct and Hansen's consent. *Id.* The Court further noted that "the incentive present in this case to violate constitutional guarantees is precisely the type of incentive that must be removed." *Id.* ¶ 67. Again the parallels between Officer Gerfen's conduct and the *Hansen* case are strong. Officer's Gerfen's objective to exploit the illegal detention demonstrates a direct connection between the purpose underlying his misconduct and Gutierrez's consent. Suppressing the evidence derived from Officer Gerfen's misconduct will have a deterrent effect on him and his fellow officers. *See, Id.* at ¶ 67.

Additionally there were no intervening factors between Officer Gerfen's misconduct and Gutierrez's consent. To cure the misconduct, intervening factors require some occurrence that creates a clean break in the chain of events connecting the misconduct to Gutierrez's consent. *See, Id.* at ¶ 68. In this instance, however, Officer Gerfen obtained consent on the heels of his misconduct, and the record is void of any intervening circumstance. (Prelim. Hr'g Tr., R. 118, at 3:21-25, 4:1-7).

The final consideration is the temporal proximity between the illegal detention and consent. "A brief time lapse between the [constitutional] violation and consent often indicates exploitation because the effects of the misconduct have not had time to dissipate." *Id.* at ¶ 69. In *Hansen* the Supreme Court noted that the "lapse of time was

negligible” because the illegal detention started when the officer questioned Hansen about drugs in his vehicle and was immediately followed by the request for and the granting of consent. *Id.* Similarly, the illegal detention of Gutierrez started when Officer Gerfen, without reasonable suspicion, asked Gutierrez if he could search his person. Gutierrez immediately granted permission rendering the time lapse between the misconduct and the consent negligible and insufficient to allow the taint of Officer Gerfen’s misconduct to dissipate.

Based on the purpose behind Officer Gerfen’s misconduct, the lack of intervening circumstances, and the negligible temporal proximity between the misconduct and consent, the consent to search granted by Gutierrez resulted from the Officer Gerfen’s exploitation of his prior illegality.

IV. THE TRIAL COURT ERRED IN FINDING OFFICER’S GERFEN’S SEARCH OF GUTIERREZ WAS INCIDENT TO A VALID ARREST.

In its Finding of Facts and Conclusions of Law (hereinafter “Findings”) the trial court ruled Officer Gerfen’s search of Gutierrez was a valid search incident to an arrest. (Finding of Facts, R. 64, at ¶ 1). Gutierrez objected to this portion of the Findings because the trial court oral’s ruling did not address that issue. (Objection to Finding of Facts Conclusion of Law, R. 54, at ¶ 2). As demonstrated by the record, the trial court only addressed the issues of consent to search and whether Utah Code Ann. § 77-7-24 prohibited Officer Gerfen from arresting Gutierrez. (Supp. Hr’g Tr., R. 120, at 8:22-25, 9:6-18). On the first issue it ruled Gutierrez consented to the search. (*Id.* at 8:22-25). It then ruled the second issue was rendered moot by the discovery of drugs. (*Id.* at 9:6-18)

The trial court nevertheless issued a memorandum decision overruling Gutierrez's objections and entered the finding of facts and conclusions of law as proposed by the State. (Mem. Decision, R. 61-62; Finding of Facts, R. 63-65). The Finding of Facts proposed by the State provided the first instance wherein the trial court addressed the State's claim the search was incident to a valid arrest.

A. The Trial Court's Committed Clear Error When It Found The Beer Bottle In Gutierrez's Car Contained Alcohol.

The findings of fact underlying a trial court's decision to grant or deny a motion to suppress is reviewed under the clearly erroneous standard. *State v. Warren*, 2003 UT 36, ¶ 12. As discussed below the trial court's sole basis for concluding the search was incident to a lawful arrest is the alleged open container violation. (Finding of Facts, R. 63-65). Probable cause to arrest Gutierrez for this violation could only exist, however, if there was a reasonable basis to believe the beer bottle actually contained alcohol. Under Utah Code Ann. § 41-6a-526 the possession or transportation of an alcoholic beverage in a motor vehicle is only prohibited if the container has alcohol in it, it has been opened, or its seal broken, or the contents partially consumed. *Id.* at (3). The statute, read as a whole, does not prohibit the transportation of empty beer bottles, cans or other empty alcohol containers. To construe the statute otherwise would cause undesired results such as dissuading the collection of litter, or the recycling of bottles and cans.

The only facts entered into the record regarding the beer bottle were provided by Officer Gerfen when he testified at the preliminary hearing. His testimony, however, was limited to three specific facts: (1) Officer Gerfen learned there was an open beer bottle on

the drivers side of the vehicle from an assisting officer; (2) the assisting officer observed the beer bottle from the passenger side window; (3) Officer Gerfen's statement in reference to Gutierrez that, "*If he had an open beer container in his vehicle*, I generally don't write citations for that." (Prelim. Hr'g Tr., R. 118, at 3:21-24, 6:25, 7:1-3).

A police officer, when confronted with a reasonable suspicion of criminal activity beyond the original purpose of the traffic stop, is obligated to pursue a course of investigation that quickly confirms or dispels his suspicions. *Lafond*, 2003 UT App. 101, ¶ 14. Yet, there is no indication in the record that Officer Gerfen pursued any investigation at all. The record instead shows that he immediately used this information as an opportunity to gain consent to search Gutierrez. (Prelim. Hr'g Tr., R. 118, 3;21-25, 4:1-7). Without this investigation the trial court was left without a sufficient factual basis to conclude the beer bottle observed in Gutierrez car contained alcohol.

Conversely, there is substantial evidence that undermines the trial court's finding. The record clearly shows that Officer Gerfen never cited Gutierrez for an open container violation. (*Id.* at 6:12-14). Nor was he charged with that crime by the State. (Information, R. 1). There is nothing in the record to suggest Officer Gerfen ever examined the beer bottle to determine whether it was empty or contained alcohol. There is no evidence in the record to suggest that either Officer Gerfen or the assisting officer observed the smell of alcohol on either Gutierrez or his passenger. The scent of alcohol on either person would help support a belief that one or the other was drinking beer from the bottle found in the car. Although Gutierrez admitted to previously drinking a beer there is nothing in the record to establish its temporal proximity to the traffic stop. Gutierrez was never

subjected to field sobriety tests despite the discovery of the beer bottle. (Prelim. Hr'g Tr., R. 118, at 6:4-6). When Officer Gerfen was asked on cross examination why he did not administer field sobriety tests he explained the Gutierrez did not appear intoxicated. (Id.) Officer Gerfen also explained that his decision to arrest Gutierrez stemmed from the discovery of the methamphetamine and not from the beer bottle. (Id. at 4:9-12). When viewed under the totality of the circumstances the facts, including all reasonable inference, fail to support the trial court's conclusion the bottle found in Gutierrez's car contained beer.

V. OFFICER GERFEN'S SEARCH OF GUTIERREZ WAS NOT A SEARCH INCIDENT TO A LAWFUL ARREST.

The trial court's legal conclusion that the search of Gutierrez was a search incident to a lawful arrest is reviewed correctness. To fall within this exception to the warrant requirement the State has the burden of proving (1) the arrest was lawful, (2) the search was in the area of the suspect's immediate control, and (3) the search is conducted contemporaneously to the arrest. *State v. Amirkhizi*, 2004 UT App 324, ¶ 16, 100 P.3d 225.

Gutierrez concedes that the second and third prongs of the tests are satisfied. After all, the search was of his person and occurred almost immediately after the discovery of the beer bottle. The true question in this case is whether the beer bottle observed in Gutierrez's vehicle formed a lawful basis for arresting him. It did not. For a warrantless arrest to be lawful it must be supported by probable cause. Probable cause in turn requires facts and circumstances within the officer's knowledge that are sufficient to

warrant a prudent person, or one of reasonable caution, in believing the suspect has or is currently committing a crime. *State v. Chansamone*, 2003 UT App. 107, ¶ 11.

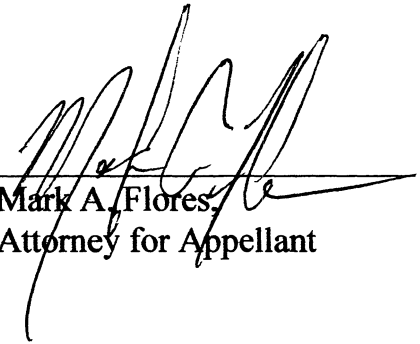
Under Utah Code Ann. § 41-6a-526, “ a person may not keep, carry, possess, transport . . . in the passenger compartment of a motor vehicle, when the vehicle is on any highway, any container *which contains any alcoholic beverage* if the container has been opened, its seal broken, or the contents of the container partially consumed. *Id.* at (3)(*emphasis added*). Probable cause to arrest Guterrez for an open container required Officer Gerfen to have within his knowledge facts and circumstance that would lead a prudent officer to believe the beer bottle actually contained beer.

Nothing in the record suggests that Officer Gerfen ever examined the bottle to determine if any of its contents remained. There is nothing in the record to suggest the bottle contained liquid in any form. As noted above Officer Gerfen admitted that Gutierrez did not appear intoxicated. (Prelim. Hr’g Tr., R. 118, at 6:4-6). There is no allegation that he smelled alcohol on either Gutierrez’s or his passenger’s breath or observed any other physical indication that either was drinking while driving in Gutierrez’s car. Because Officer Gerfen failed to determine if the bottle still contained beer he lacked the probable cause to conclude Gutierrez violated Utah open container statute.

CONCLUSION

For the reasons stated above Gutierrez respectfully request an order from the Utah Court of Appeals reversing the trial court’s denial of his motion to suppress.

DATED this 9th day of November 2006.




Mark A. Flores,
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on 9th day of November 2006 I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE** to be served, via U.S. Mail, postage prepaid, upon:

Utah Attorney General
Appeals Division
160 East 300 South
P.O. Box 140854
Salt Lake City, Utah 84114-0854



Mark A. Flores

ADDENDUM

Information	Exhibit 1
Preliminary Hearing Transcript	Exhibit 2
Motion to Suppress and Memorandum in Support	Exhibit 3
State Opposition to Motion to Suppress	Exhibit 4
Transcript of Hearing on Motion to Suppress	Exhibit 5
Objections to Findings of Facts and Conclusions of Law	Exhibit 6
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Findings of Facts and Conclusions of Law	Exhibit 8
Order on Motion for Rehearing or Motion to Suppress and Stay Entry of Findings of Facts	Exhibit 9

Tab 1

EXHIBIT 1
(Information)

Amy F. Hugie, 8207
Box Elder County Attorney
01 South Main
Brigham City, Utah 84302
Telephone: (435) 734-3329
Fax: (435) 734-3374

BRIGHAM DISTRICT COURTS

2005 MAR 21 AM 10:29

IN THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

ALFREDO MUNOZ GUTIERREZ
228 W. 100 N. Apt. 4
Brigham City, UT 84302
DOB: 10/30/1982,

Defendant.

INFORMATION

Court Case #: 051100099

Judge: Hadfield

The undersigned, as prosecuting attorney states on information and belief that the above-named defendant, in Box Elder County, State of Utah, committed the following crime(s):

COUNT 1

POSSESSION OR USE OF A CONTROLLED SUBSTANCE (DFZ) (559), a second ^{third} degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i), as follows: That Alfredo Munoz Gutierrez on or about March 6, 2005, did knowingly and intentionally possess or use a controlled substance, to wit, methamphetamine, and committed the offense within ~~a thousand feet of a school, church, or public parking lot.~~ *MS*

COUNT 2

POSSESSION OF DRUG PARAPHERNALIA (DFZ) (1269), a class A misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1), as follows: That Alfredo Munoz Gutierrez

on or about March 6, 2005, did knowingly, intentionally or recklessly use, or possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body. Furthermore, the defendant committed the offense within a thousand feet of a school, church, or public parking lot.

COUNT 3

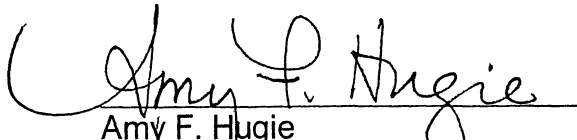
SPEEDING (108), a class C misdemeanor, in violation of Utah Code Ann. § 41-6-46, as follows: That Alfredo Munoz Gutierrez on or about March 6, 2005, did operate a vehicle at a speed greater than was reasonable and prudent under the conditions, giving regard to the actual and potential hazards then existing, to wit: 57 miles per hour in a 35 miles per hour zone.

COUNT 4

FOLLOWING TOO CLOSE (50), a class C misdemeanor, in violation of Utah Code Ann. § 41-6-62(1), as follows: That Alfredo Munoz Gutierrez on or about March 6, 2005, did follow another vehicle more closely than is reasonable and prudent, having regard for the speed of the vehicles and the traffic upon and the condition of the highway.

This information is based on evidence obtained from the following witness: Cpl. Travis Gerfen.

DATED this 18 day of March, 2005.


Amy F. Hugie
Box Elder County Attorney

Tab 2

EXHIBIT 2
(Preliminary Hearing Transcript)

1 IN THE FIRST JUDICIAL DISTRICT COURT

2 BOX ELDER COUNTY, STATE OF UTAH

3 STATE OF UTAH,

4 Plaintiff,

5 vs.

6 ALFREDO GUTIERREZ,

7 Defendant.

)
)
)
) Case No. 051100099
) Transcript of Audio CD.
)
)

8 -----
9 **Transcript of Preliminary Hearing.**
Honorable Ben H. Hadfield presiding.
10 First District Court Courthouse
Brigham City, Utah
11 June 1, 2005

12 * * *

13 APPEARANCES:

14 For the Plaintiff: BRAD C. SMITH
Deputy County Attorney

15
16 For the Defendant: MARTIN V. GRAVIS
Attorney at Law

17
18
19
20 RODNEY M. FELSHAW
Registered Professional Reporter
21 First District Court
P. O. Box 873
22 Brigham City, UT 84302-0873

23
24 ORIGINAL

25
FILED
UTAH APPELLATE COURTS
SEP 25 2006

1 **THE CLERK:** Case number 05110099, State of Utah
2 versus Alfredo Gutierrez. Counsel, please state your names
3 for the record.

4 **MR. SMITH:** Brad Smith, State of Utah.

5 **MR. GRAVIS:** Martin Gravis for the defendant,
6 Alfredo Gutierrez.

7 **THE COURT:** This is the time scheduled for a
8 preliminary hearing. Are the parties ready to proceed?

9 **MR. SMITH:** We are.

10 **MR. GRAVIS:** The defense is ready, Your Honor.

11 **THE COURT:** You may call your first witness.

12 **MR. SMITH:** The state calls Officer Travis Gerfen.

13 **TRAVIS GERFEN,**
14 being first duly sworn, was examined and
15 testified as follows:

16 **DIRECT EXAMINATION**

17 **BY MR. SMITH:**

18 **Q.** Officer Gerfen, will you state your name for the record.

19 **A.** Travis Gerfen.

20 **Q.** And who are you employed by?

21 **A.** Brigham City police department.

22 **Q.** And what is your position with the Brigham City police
23 department?

24 **A.** I'm a corporal on patrol.

25 **Q.** Are you familiar with the defendant, Alfredo Gutierrez?

1 **A.** I am.

2 **Q.** How do you know him?

3 **A.** I conducted a traffic stop on March 6th, 2005.

4 **Q.** Could you describe what the circumstances of that stop
5 were?

6 **A.** I was on patrol. I was down by the north 7-Eleven
7 between Main Street and First East. I saw a green Isuzu
8 Rodeo traveling southbound. It appeared he was too close to
9 another vehicle, so I pulled out on Main Street to get there
10 and see how close he was. By the time I turned onto Main
11 Street he was quite a ways up there, so I turned on my radar,
12 the same direction of travel as he was. He was going 52
13 miles per hour in a 35 and so I pulled him over.

14 **Q.** Okay. What happened when you pulled the vehicle over?

15 **A.** He stopped.

16 **Q.** And who was driving the vehicle?

17 **A.** It was Alfredo Gutierrez.

18 **Q.** Okay.

19 **A.** He stopped right in front of the police department
20 southbound on Main Street. I went up to him, talked to him,
21 got his information, driver's license and registration. At
22 that time Officer Panner showed up and he went up to the
23 passenger side window and told me that he could see an open
24 beer bottle by the driver's side. At that point I asked him
25 to exit and asked him if he was drinking.

1 Q. What did he say?

2 A. Umm, he said he only had had one beer.

3 Q. What happened next?

4 A. I asked him if I could search his person to see if he had
5 anything illegal, because he had been drinking. In his sweat
6 shirt pocket he had a winter type stocking hat; and inside
7 that hat was a methamphetamine pipe with residue.

8 Q. What happened next?

9 A. I placed him under arrest for that, for the possession of
10 methamphetamine and paraphernalia. Officer Panner got the
11 passenger information and he had warrants and so he was also
12 arrested for his warrants.

13 Q. How did you recognize the methamphetamine in the pipe?

14 A. From my training and experience, three years in the
15 strike force.

16 Q. And what did you do with the pipe?

17 A. I took it to the police department and placed it into
18 evidence.

19 MR. SMITH: Okay. Thank you. That's all I have.

20 THE COURT: Mr. Gravis.

21 CROSS-EXAMINATION

22 BY MR. GRAVIS:

23 Q. Was the residue, or whatever, in the pipe tested?

24 A. It was, but I do not have the results from it.

25 Q. Okay. Now, you say you stopped Mr. Gutierrez and he gave

1 you a valid driver's license, correct?

2 A. I can't remember if he did or not.

3 Q. You never gave him a ticket for no driver's license?

4 A. I don't believe I did.

5 Q. He gave you the registration and insurance and all that
6 stuff, right?

7 A. I believe so, yes.

8 Q. And everything appeared to be in order, correct?

9 A. Yes.

10 Q. And what address was on the driver's license?

11 A. I don't remember that. I don't write that down
12 generally.

13 Q. Was it a local address?

14 A. That I couldn't tell you.

15 Q. Okay. Now, you say that the other officer saw a beer in
16 the car and you asked Mr. Gutierrez if he'd been drinking and
17 he said one beer, correct?

18 A. That's correct.

19 Q. You asked him to step out of the vehicle and then you
20 asked to search him. Why did you want to search him?

21 A. If I pull somebody out on a traffic stop, if they've been
22 drinking or if I believe they're in the process of committing
23 a crime, I'll search them if they give me permission to.

24 Q. Okay. He'd been drinking but he did not appear to be
25 intoxicated, right?

1 **A.** He did not, no.

2 **Q.** So you had no reason to arrest him for DUI, correct?

3 **A.** I did not arrest him for DUI, no.

4 **Q.** Okay. In fact, you never even asked him to do field
5 sobriety tests, correct?

6 **A.** He didn't appear to be intoxicated.

7 **Q.** And at this time where was his paperwork, his license,
8 registration, insurance card?

9 **A.** I don't remember.

10 **Q.** He handed it to you. Had you given it back to him?

11 **A.** I don't remember.

12 **Q.** Had you written him a citation at that point in time?

13 **A.** If I did, there isn't a copy of the citation in the
14 report. I don't think I wrote a citation.

15 **Q.** You placed him under arrest after you searched him,
16 correct?

17 **A.** That is correct.

18 **Q.** Okay. Prior to finding the pipe in his jacket, did you
19 have any reason to believe that if you wrote him a traffic
20 citation he would not appear in court?

21 **A.** Generally, if they have meth on them, I'm not going to --

22 **Q.** Prior to discovering that did you have any reason to
23 believe that if you wrote him a citation he would not appear
24 in court?

25 **A.** If he had an open beer container in his vehicle, I

1 generally don't write a citation for that. I usually
2 (unintelligible). So with that information alone, no, I
3 wouldn't write him a citation.

4 Q. You wouldn't write him a citation because he had an open
5 container?

6 A. That's correct.

7 Q. Okay. So you would have arrested him, is what you're
8 saying, and searched him anyway?

9 A. That's correct.

10 MR. GRAVIS: Okay. I have nothing further.

11 THE COURT: Any redirect?

12 MR. SMITH: No.

13 THE COURT: You may step down. Your next witness.

14 MR. SMITH: The state rests.

15 MR. GRAVIS: We'll submit it, Your Honor.

16 THE COURT: Based on the evidence presented at the
17 preliminary hearing, the court finds that there are
18 reasonable grounds to believe that the defendant committed
19 the offense of possession of a controlled substance within a
20 thousand feet of a public facility, use or possession of drug
21 paraphernalia, speeding, and following a vehicle too closely.
22 Therefore he'll be held to answer on those charges.

23 He has the formal information there. Does he waive the
24 formal reading of those charges?

25 MR. GRAVIS: I don't have a copy of the formal

1 information.

2 **THE COURT:** We can make a copy for you. One was
3 originally given to him, but I think he had other counsel.

4 **MR. GRAVIS:** Yes. I have police reports, but I
5 didn't get a copy of the information.

6 **THE COURT:** Let me go ahead and hand you the file
7 and you can show it to him. I'll ask if he wants to waive
8 the formal reading of those charges?

9 **MR. GRAVIS:** We will waive the reading, Your Honor.

10 **THE COURT:** All right. After the hearing, if you
11 like, you can take the file downstairs and get a copy then.

12 As to those four counts, how does the defendant plead?

13 **MR. GRAVIS:** Not guilty.

14 **THE COURT:** How much time would you like before we
15 do further scheduling?

16 **MR. GRAVIS:** When is your next arraignment date,
17 Your Honor?

18 **THE COURT:** I can give you a pretrial on either June
19 22 or July 5th.

20 **MR. GRAVIS:** I know I can't do July 5th. Let's do
21 June 22nd. What time, Your Honor?

22 **THE COURT:** 10:00 on June 22nd for a pretrial.
23 We'll see you then.

24 (Hearing concluded.)

25

C E R T I F I C A T E

THIS IS TO CERTIFY that the CD recorded hearing was transcribed by me, Rodney M. Felshaw, a Certified Court Reporter and Certified Court Tape Transcriber in and for the State of Utah.

That a full, true and correct transcription of the hearing, to the best of my ability, is set forth in the pages numbered 2 to 8, inclusive.

I further certify that the original transcript was filed with the Court Clerk, First District Court, Box Elder County, Brigham City, Utah.

Dated this 7th day of September, 2006.



Rodney M. Felshaw, C.S.R., R.P.R.

Tab 3

EXHIBIT 3
(Motion to Suppress and Memorandum in Support)

MARTIN V. GRAVIS (#1237)
ATTORNEY FOR ALFREDO GUTIERREZ
2562 Washington Boulevard
Odgen, Utah 84401
Telephone: (801) 392-8247
Fax: (801) 334-7275

2017 JUN 17 14:11:01

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH, BRIGHAM CITY DEPARTMENT

STATE OF UTAH, Plaintiff, vs. ALFREDO GUTIERREZ, Defendant.	MOTION TO SUPPRESS AND MEMORANDUM IN SUPPORT THEREOF JUDGE BEN HADFIELD CASE No. 051100099
---	--

COMES NOW, Defendant, by and through his Attorney, Martin V. Gravis, and hereby moves the above entitled Court to Suppress statements of the defendant. This motion is based upon the 4TH and 14TH Amendment to the U.S. Constitution and Article I, Section 14 of the Constitution of Utah.

STATEMENT OF FACTS

THE DEFENDANT was driving a vehicle in Brigham City, Utah, on March 6, 2005 when he was stopped for violatio of Utah Code Annotated 41-6-46, speeding, and 41-6-55, following to close. After the officer stopped the defendant he saw an open bottle of beer by the passenger. The officer then asked the defendant for permission to search him but had no reason to believe the defendant had any open containers on him. The officer found the alleged contraband in a hat in the defendant's coat pocket. The officer then arrested the defendant and also charged him a violation of 41-6-44.20, open container.

The offier testified that he did not remember if the defendant had a valid drivers license (he did) and where the defendant lived. (he lives in Brigham city).

**ARGUEMENT
POINT I**

THE OFFICER exceeded the scope of the traffic stop by extending the stop to obtain consent to search the defendant, therefore the consent was illegally obtained as a result of the illegal detention and illegal.

In *State v. Godina-Luna* 826 P.2d.652 (Utah App. 1992), the Court said as follows:

[3] Once a Fourth Amendment seizure has occurred, any detention for reasons exceeding the scope of the original stop and not reasonably related to the circumstances justifying the stop in the first place, is illegal. *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 1878-79, 20 L.Ed.2d 889 (1968); *State v. Robinson*, 797 P.2d 431, 437-38 (Utah App. 1990).

[4] In other words, “[t]he length and scope of the detention must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” *State v. Johnson*, 805 P.2d 761,763 (Utah 1991); (quoting *Terry*, 392 U.S. at 19-20, 88 S. Ct. At 1879). Once the reasons for the initial stop have been satisfied, the individual *655 must be allowed to proceed on his or her way. “Any further temporary detention for investigative questioning after the fulfillment of the purpose for the initial traffic stop is justified under the fourth amendment only if the detaining officer has a reasonable suspicion of serious criminal activity.” *Robinson*, 797 P.2d at 435 (citing *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1998)).

Since the officer’s request to search the defendant was not related to the stop or even the open container and occurred prior to the issuance of any citation, it constitutes an illegal search because of the illegal detention of the defendant and the defendant’s consent was obtained as a result of the officer’s illegal act.

POINT II

The State cannot argue inevitable discovery since the officer could not have legally arrested the defendant for the open container violation.

Title 41-6-166 says as follows:

Appearance upon arrest for misdemeanor- Setting bond. Whenever any person is arrested for any violation of this act punishable as a misdemeanor, the arrested person, for the purpose of setting bond, shall in the following cases, be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been nearest or most accessible with reference to the place where said

arrest is made, in any of the following cases:

- (1) When a person arrested demands an immediate appearance before a magistrate.
- (2) When the person is arrested upon a charge of driving or being in actual physical control of a vehicle while under the influence of alcohol or any drug or combination thereof as prescribed in Section 41-6-44.
- (3) When the person is arrested upon a charge of failure to stop in the event of an accident causing death, personal injuries, or damage to property.
- (4) In any other event when the person arrested refuses to give his written promise to appear in court as herinafter provided, or when in the discretion of the arresting officer, a written promise to appear is insufficient.

This statute has not been interpreted by the appellate courts but was raised in both the Utah Court of Appeals and the Utah Supreme Court in the case of *State v. Harmon* 654 P.2d 1037 (Utah App. 1993) 910 P.2d 1196 (Utah 1995). The Appellate Courts determined in that case that since Harmon was for driving on suspension which is not an offense under 41-6-et.seq. that 41-6-166 did not apply but the Supreme Court did say as follows:

These factors notwithstanding, we conclude that Harmon's arrest for driving on suspension was not unreasonable in light of the governmental interest in removing unlicensed drivers from the road for public safety reasons. Other jurisdictions have uniformly held that driving on suspension is sufficiently serious to justify the offender's arrest rather than mere detention and citation. *See, e.g., State v. S.P.*, 580 S. 2d 216, 217 (Fla. Dist. Ct. App.), *review denied*, 592 So.2d 682 (1991); *People v. Anderson*, 169 Ill. App. 3d 289, 120 Ill. Dec. 123, 129, 523 N.E.2d 1034, 1040, *appeal denied*, 122 Ill.2d 579, 125 Ill.Dec.223, 530 N.E.2d 251 (1988),

Page 1204

cert. Denied, 490 U.S. 1036, 109 S.Ct. 1935, 194 L.Ed.2d 407 (1989); *State v. Pierce*, 136 N.J. 184, 642 A.2d 947, 958 (1994) (upholding arrest in part because driving on suspension "poses grave danger to the public"); *State v. Hollis*, 161 Vt. 87, 633 A.2d 1362, 1364 (1993); *State v. Reding*, 119 Wn.2d 685, 835 P.2d 1019, 1023 (1992) (overruling prior contrary authority).

[fn.10] Harmon has not identified, and we have not found, a single case where an arrest for driving on suspension has been held to be unconstitutional.

This holding should be construed narrowly and does not necessarily apply to other traffic violations. "It should be the policy of every law enforcement agency to issue citations in lieu of

STATE OF UTAH VS. ALFREDO GUTIERREZ
MOTION TO SUPPRESS AND
MEMORANDUM IN SUPPORT THEREOF
CASE NO. 051100099

arrest of continued custody to the maximum extent at 432 (citing A.B.A. Standards Relating to Pretrial Release §2.1 (Approved Draft, 1968); *see also Parker*, 834 P.2d at 595 (“[I]t is difficult to imagine any circumstances surrounding a routine traffic stop in which [an arrest] would be justified.”). As we stated in *Lopez*:

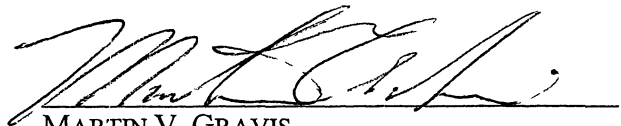
[A]n officer conducting a routine traffic stop may request a driver’s license and vehicle registration, conduct a computer check, and issue a citation. However, *once the driver has produced a valid driver’s license and evidence of entitlement to use the vehicle*, “he must be allowed to proceed on his way, without being subjected to further delay by police for additional questioning.”

This issue is again before the Utah Court of Appeals in the case of *State v. Mike Martinez*, case number 20041090, where the Court has agreed to hear this issue on interlocutory appeal.

CONCLUSION

Since the defendant did not fit into any of the four exceptions under 41-6-166, it would be illegal to arrest him and therefore any search incident to arrest would be illegal.

DATED THIS 15 day of June, of 2005


MARTIN V. GRAVIS
ATTORNEY AT LAW

CERTIFICATE OF DELIVERY

I HEREBY certify that I delivered a true and correct copy of the foregoing MOTION TO
SUPPORT AND MEMORANDUM IN SUPPORT THEREOF, this 11th day of June, of 2005, to:

BRAD SMITH
DEPUTY BOX ELDER COUNTY ATTORNEY
33 S. Main St., 2A
Brigham City, UT 84302


CATHERINE CROMPTON
SECRETARY

Tab 4

EXHIBIT 4
(State's Opposition to Motion to Suppress)

Amy F. Hugie, No. 8207
Box Elder County Attorney
Benjamin C Rasmussen, No. 9462
Deputy County Attorney
01 South Main Street
Brigham City, Utah 84302
Tel: (435) 734-3329
Fax: (435) 734-3374

IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR BOX ELDER COUNTY, STATE OF UTAH	
STATE OF UTAH, Plaintiff, vs. ALFREDO GUTIERREZ, Defendant.	STATE'S OPPOSITION TO MOTION TO SUPPRESS Criminal No. 051100099 Judge Ben H. Hadfield

COMES NOW the State of Utah, by and through the undersigned Deputy County Attorney, and opposes Defendant's Motion to Suppress. Officer Gerfen's arrest and search were justified by the open container in plain view in Defendant's vehicle.

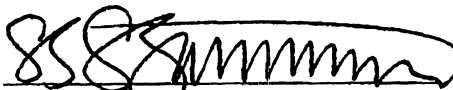
Defendant argues that Officer Gerfen obtained illegal consent to search the vehicle, having no justification to inquire further. To the contrary, the officer's identification of an open alcohol container in the vehicle justified further search. In State v. O'Brien, 959 P.2d 647 (Utah Ct. App. 1998), the trial court suppressed an officer's search conducted after the Defendant had made furtive movements, advised the officer of the presence of a gun in his vehicle, and the officer saw an open alcohol container in plain view. The Court of Appeals reasoned that where the officer lawfully arrived at a

place where the open container could be viewed, and the open container was immediately incriminating, "the [officer] had probable cause to arrest defendant and lawfully seize the evidence."

This case presents the same circumstances. Officer Gerfen lawfully detained the Defendant for following too close and speeding when Officer Panter, who was assisting with the search, spotted an open beer container in plain view. In accordance with O'Brien, that incriminating evidence gave officers probable cause to arrest the suspect and conduct a search incident to arrest. This is also consistent with Utah statute, which allows an officer to arrest without a warrant "when he has reasonable cause to believe the person is committing a public offense, and there is reasonable cause for believing the person may: ... (c) injure another person..." Utah Code Ann. § 77-7-2(3). An officer who identifies an individual with an open container in a vehicle has reasonable cause to believe the individual has committed a public offense and is a danger to other motorists and his passengers.

Therefore, because there was reasonable cause for the arrest and search, the officer's search was constitutionally sound. Defendant's motion lacks merit. The State therefore respectfully requests that the motion be denied.

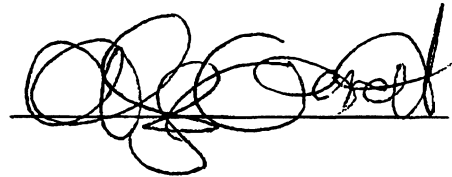
DATED this 12 day of August, 2005.


Benjamin C. Rasmussen
Deputy County Attorney

Certificate of Mailing

I hereby certify that on this 12 day of August, 2005, I faxed and mailed, postage prepaid, a true and correct copy of the foregoing Opposition Memorandum, to the following individual:

Martin V. Gravis
2562 Washington Blvd.
Ogden, UT 84401

A handwritten signature in black ink, appearing to read "Martin V. Gravis", written over a horizontal line.

Tab 5

EXHIBIT 5
(Transcript of Hearing on Motion to Suppress)

IN THE FIRST JUDICIAL DISTRICT COURT

BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH,)
)
Plaintiff,)
)
vs.) Case No. 051100099
) Transcript of Audio CD.
ALFREDO GUTIERREZ,)
)
Defendant.)

Transcript of Motion to Suppress Hearing.

Honorable Ben H. Hadfield presiding.
First District Court Courthouse
Brigham City, Utah
August 15, 2005

* * *

APPEARANCES:

For the Plaintiff: BRAD C. SMITH
Deputy County Attorney

For the Defendant: MARTIN V. GRAVIS
Attorney at Law

RODNEY M. FELSHAW
Registered Professional Reporter
First District Court
P. O. Box 873
Brigham City, UT 84302-0873

ORIGINAL

FILED
UTAH APPELLATE COURTS
SEP 25 2006

1 **THE CLERK:** Case number 051100099, State of Utah
2 versus Alfredo Gutierrez. Counsel, please state your names
3 for the record.

4 **MR. SMITH:** Brad Smith for the state.

5 **MR. GRAVIS:** Martin Gravis for the defendant.

6 **THE COURT:** This is the time scheduled for a hearing
7 on a motion to suppress. Do counsel anticipate presenting
8 any evidence?

9 **MR. SMITH:** No.

10 **MR. GRAVIS:** No, Your Honor.

11 **THE COURT:** Okay. I'll hear from you. Go ahead.
12 I've read the memoranda just this morning.

13 **MR. GRAVIS:** I believe it is the state's burden so
14 they should go first.

15 **MR. SMITH:** Your Honor, the evidence in this case is
16 as follows. A traffic stop was initiated due to legitimate
17 reasons to stop. When the stop occurred officers approached
18 the car. Officer Panner in particular saw an open container
19 in the vehicle. That in turn led to a further search that
20 discovered the controlled substance and the possession.

21 It is our contention that at each stage of the traffic
22 stop the officers continued to detain the defendant and
23 searched only to dispel suspicions based on reasonable and
24 observable and articulable facts. This case is identically
25 the same as the case we cited, State versus O'Brien, in which

1 the Utah Court of Appeals specifically held that the officer
2 had probable cause to arrest the defendant and lawfully seize
3 the evidence. That case was identically the same. There was
4 a traffic stop based on traffic violations. The violation --
5 the stop in turn led to the discovery of an open container
6 and an arrest and a detention.

7 In this case, Officer Panner, upon approaching the
8 vehicle, sees the open beer container in plain view. That
9 certainly is a basis to detain the vehicle and to search
10 further. And so there is in our estimation no Fourth
11 Amendment issue here whatsoever.

12 **THE COURT:** Mr. Gravis.

13 **MR. GRAVIS:** That's not quite the situation here.
14 We agree that he was legitimately pulled over for traffic
15 violations and the officer approached the vehicle and saw an
16 open container. At that point, having no reason to believe
17 that my client was either presently armed or dangerous, or
18 that he had any open containers on his person, he extended
19 the detention to ask content to search my client's person,
20 which is where the controlled substance was allegedly found.
21 Not in the vehicle, but on my client's person. In O'Brien
22 there was also drug paraphernalia.

23 **THE COURT:** He didn't say about the open container
24 until --

25 **MR. GRAVIS:** I'm not objecting to the open

1 container. We have no cause -- we agree that that was in
2 plain view and the officer could lawfully seize it. It's the
3 contraband allegedly found on my client that we're objecting
4 to on the basis that there was no reason to extend the
5 duration of the detention to ask consent to search.

6 Based upon the cases we cited in our memorandum, Godina,
7 Luna, the purpose of the original stop was for the traffic
8 violation. The officer had reason to extend it for the open
9 container, but not to extend it to search my client's person.
10 And so that makes the detention illegal because of Terry.
11 All the cases say you can only detain a person as long as
12 necessary for what you detained him for. He has to be free
13 to go before you can ask for consent to search the person.
14 If he's not free to go, that's an illegal detention.

15 We anticipate that the state's next argument is that it
16 was a search incident to a lawful arrest. It's our position,
17 under 41-6-166, that the officer did not have the legal right
18 to arrest him. That again is different from O'Brien because
19 in O'Brien there was also drug paraphernalia.

20 41-6-166 says for any violation of something contained in
21 41-6 an officer should issue a citation unless there's the
22 four exceptions, which are when the person arrested demands
23 an immediate appearance before a magistrate. Mr. Gutierrez
24 did not. When the person arrested is on a charge of driving
25 or being in actual physical control of a vehicle under the

1 influence of any drug or combination thereof as prescribed in
2 section 41-6-44. That is also not the case. When the person
3 is arrested upon a charge of failure to stop in the event of
4 an accident causing death, personal injury or damage to
5 property. That is also not the case.

6 And lastly, in any other event when the person arrested
7 refuses to give his written promise to appear in court as
8 hereinafter provided; or when, in the discretion of the
9 arresting officer, a written promise to appear is
10 insufficient. In this case the officer testified that he
11 exercises no discretion. He arrests everybody he stops for
12 open container.

13 He had no reason to believe that Mr. Guitierrez wouldn't
14 appear on the citation. During the preliminary hearing he
15 testified he didn't remember whether or not he had a valid
16 license or where he lived. Number one, he's not been charged
17 with driving on suspension or driving without no license.
18 Number two, the court records clearly indicate he resides
19 here in Brigham City.

20 It's our position that under 41-6-166 the arrest was
21 unlawful and therefore the search cannot be saved as a search
22 incident to an arrest.

23 **THE COURT:** Mr. Smith.

24 **MR. SMITH:** The argument arising out of section 166
25 is certainly interesting. It's also irrelevant. Section 166

1 simply doesn't go to the legality of a search or a seizure.

2 It's not intended to address that and it simply doesn't.

3 We ask the question in a Fourth Amendment case based on
4 the totality of the circumstances. In this case what the
5 defense is asking you to do is to pull apart all of the
6 strands and cut them down one by one. What you have is
7 somebody who is speeding through town, who is observed, and
8 is lawfully stopped. When the stop is initiated the open
9 container is found.

10 At that point the question is is it legitimate to further
11 detain the occupants for further investigation? Given the
12 totality of the circumstances, I do not believe the court can
13 reasonably say that the officer's behavior was unreasonable
14 in requesting consent.

15 Based on the totality of the circumstances, it's the
16 state's contention that it was a lawful stop and a lawful
17 seizure and there's no basis to suppress under the applicable
18 case law. The state will submit the matter.

19 **THE COURT:** Go ahead.

20 **MR. GRAVIS:** I do agree that --

21 **MR. SMITH:** Your Honor, I'm going to object. If
22 it's my burden I get the last word.

23 **THE COURT:** I know. I'm letting him have it both
24 ways here.

25 **MR. GRAVIS:** This isn't beyond a reasonable doubt so

1 I think --

2 **THE COURT:** No. What he's suggesting is if it was
3 your motion you could start the argument and end it. If the
4 burden is on him he starts and ends it.

5 **MR. GRAVIS:** In civil cases both sides get to argue
6 the same number of times. This is the same burden.

7 **THE COURT:** Go ahead.

8 **MR. GRAVIS:** Anyway, our position is that, yes, he
9 did have the right to investigate the open container, but
10 when the officer has no lawful -- no facts to believe that
11 the defendant had an open container on his person, that is
12 then an unjustifiable detention. It increases the detention
13 unjustifiably to conduct something not within the reasonable
14 stop. He's extending the duration of the detention for
15 something not connected with what he's investigating.

16 The case law is -- there's lots of case law besides
17 Godina and Luna that says an officer may not extend the
18 duration of the stop to ask for consent to search without a
19 reasonable belief that he would find something on the person.
20 There's absolutely no facts that he would find any open
21 containers. And it's not connected in any way with an open
22 container violation, a speeding violation or following too
23 close violation. We submit that the search is illegal.

24 **THE COURT:** As I understand the facts counsel have
25 submitted, the defendant is lawfully pulled over for

1 speeding, and other traffic offenses, within the limits of
2 Brigham City. During the stop, and a discussion about that,
3 one of the two officers observes an open container of an
4 alcoholic beverage in the passenger section of the vehicle
5 where the people are, not in the trunk. Under those
6 circumstances the officer would have the right, in this
7 court's view, at a minimum to further pursue the matter,
8 perhaps by conducting sobriety tests with the driver or other
9 things, to ensure that he has not been consuming and there's
10 no impairment.

11 You already have a traffic violation. When you couple
12 that with the presence of alcohol, I think it would be
13 negligent on the officer's part to not do some follow up
14 there.

15 Now, in that case he's entitled to detain for some
16 additional time to conduct those types of activities. The
17 officer, as I understand it, asked would it be okay to
18 conduct a pat down, a search. The defendant apparently
19 consented and then some contraband was found in a pocket on
20 the defendant. Is that correct?

21 **MR. GRAVIS:** That's correct.

22 **THE COURT:** Under those circumstances the court
23 finds that the request for permission to search was a
24 legitimate one in as much as the request was granted, consent
25 was granted. The court denies the motion to suppress the

1 evidence.

2 Now, I can give you some time before we schedule a
3 pretrial. I don't know how much time you feel you need.

4 **MR. GRAVIS:** We'll be asking for written findings of
5 fact and conclusions of law.

6 Is the court going to address the second part of the
7 argument if we were to take it up on appeal?

8 **THE COURT:** With regards to releasing him?

9 **MR. GRAVIS:** No. With regards to the second part of
10 the argument about the --

11 **MR. SMITH:** The 166?

12 **THE COURT:** Right. Releasing him -- issuing a
13 citation rather than arresting him. Under the circumstances
14 I'm not going to -- well, I guess I could address that in
15 this sense. If I find that the pat down search was lawful,
16 then once they found the drugs they're not under an
17 obligation at that point to issue him a citation and send him
18 on his way. So I think it kinds of loops that argument.

19 **MR. GRAVIS:** Okay.

20 **THE COURT:** Mr. Smith, if you would prepare a
21 proposed set of findings. Now, I can offer you a pretrial
22 probably September 12th or September 26th if you have a
23 preference. 1:30 either one. Those are both Mondays.

24 **MR. GRAVIS:** The 12th would be the best.

25 **THE COURT:** All right. September 12th, 1:30, for a

1 pretrial conference. We'll see you then.

2 **MR. GRAVIS:** Your Honor, just to make sure, when you
3 sign the findings of fact and conclusions of law will you
4 make note to send me a copy? Last time I didn't get a copy
5 until almost time --

6 **MR. SMITH:** I'll send you a copy of the findings
7 before they go to the court and wait ten days to submit them.

8 **MR. GRAVIS:** Okay.

9 **THE COURT:** That way we'll you'll have an
10 opportunity to object. All right.

11 (Hearing concluded.)

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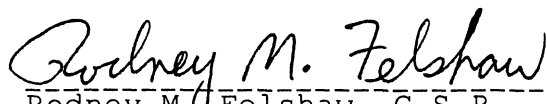
C E R T I F I C A T E

THIS IS TO CERTIFY that the audio CD recorded hearing was transcribed by me, Rodney M. Felshaw, a Certified Court Reporter and Certified Court Tape Transcriber in and for the State of Utah.

That a full, true and correct transcription of the hearing, to the best of my ability, is set forth in the pages numbered 2 to 10, inclusive.

I further certify that the original transcript was filed with the Court Clerk, First District Court, Box Elder County, Brigham City, Utah.

Dated this 11th day of September, 2006.


Rodney M. Felshaw, C.S.R., R.P.R.

Tab 6

EXHIBIT 6
(Objection to Findings of Facts and Conclusions of Law)

MARTIN V. GRAVIS (# 1237)
Attorneys for Defendant
2562 Washington Boulevard
Ogden, Utah 84401
Telephone: (801) 392-8231

BOX ELDER DISTRICT COURT

2005 SEP -7 AM 10:49

IN THE FIRST JUDICIAL DISTRICT COURT,
STATE OF UTAH, BOX ELDER DEPARTMENT

STATE OF UTAH,

Plaintiff,

vs.

ALFREDO GUTIERREZ,

Defendant.

OBJECTION TO THE
FINDINGS OF FACTS AND
CONCLUSIONS OF LAW

Case No. 051100099

JUDGE BEN HADFIELD

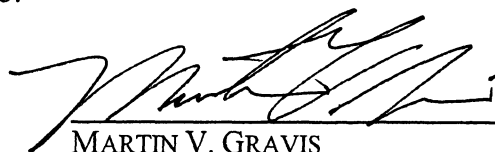
COMES NOW Defendant, by and through his Attorney, Martin Gravis, and hereby objects to the following Findings of Fact and Conclusions of Law.

1. Paragraph 3 in the Findings of Fact should read as follows:

Officer Gerfen subsequently requested consent to search the defendant's person prior to issuing the citation and without a reasonable suspicion based upon articulable facts that the defendant had any alcohol on his person.

2. The Court did not reach any decision on the issue of paragraph 1 of the Conclusions of Law.

DATED this 2 day of September, of 2005.



MARTIN V. GRAVIS
ATTORNEY FOR DEFENDANT

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and correct copy of the foregoing OBJECTION TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW, this 2 day of September, of 2005, to:

AMIE HUGIE
BOX ELDER COUNTY ATTORNEY
01 S. Main Street
Brigham City, Utah 84302


CATHERINE CROMPTON
SECRETARY

Tab 7

EXHIBIT 7
(Memorandum Decision on Defendant's Objection to
Findings of Fact and Conclusions of Law.)

17 04:18

*FIRST JUDICIAL DISTRICT COURT IN AND FOR
BOX ELDER COUNTY, STATE OF UTAH*

STATE OF UTAH,

Plaintiff,

vs.

ALFREDO GUTIERREZ,

Defendant.

HON. BEN H. HADFIELD

MEMORANDUM DECISION

Case No. 051100099

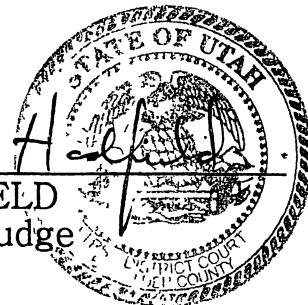
This matter comes before the Court, pursuant to the defendant's *Objection to the Findings of Fact and Conclusions of Law*, proposed by the prosecution. These findings and conclusions are a result of the hearing which occurred before the Court on August 15, 2005.

The Court has reviewed the proposed findings and conclusions, the objection of the defendant, and a transcript of the August 15th hearing. The Court, now being fully advised in the matter, determines that the proposed Findings of Fact and Conclusions of Law comport with the decision issued by this Court from the bench on August 15th and therefore, simultaneous with the entry of this memorandum decision, the Court will sign and enter the findings and conclusions.

This matter is scheduled for a pre-trial conference on November 7, 2005 at 1:30 p.m.

Dated this 17 day of October, 2005.


BEN H. HADFIELD
District Court Judge

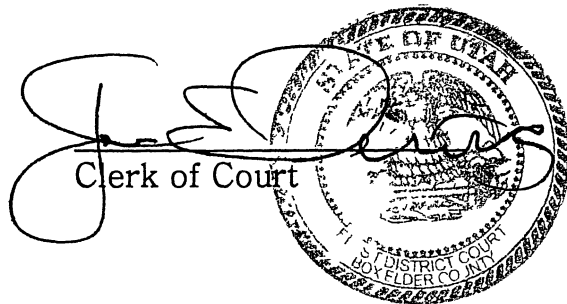


CERTIFICATE OF MAILING

I hereby certify that on the 17th day of October, 2005, I mailed a true and correct copy of the foregoing Memorandum Decision in the case of State vs. Gutierrez, case number 051100099, as follows:

Amy F. Hugie
Box Elder County Attorney
01 South Main Street
Brigham City, Utah 84302

Martin V. Gravis
Attorney At Law
2562 Washington Blvd
Ogden, Utah 84401



Tab 8

EXHIBIT 8
(Findings of Facts and Conclusions of Law)

Amy F. Hugie, No. 8207
Box Elder County Attorney
Brad C. Smith, No. 6656
Benjamin C Rasmussen, No. 9462
Deputy County Attorney
01 South Main Street
Brigham City, Utah 84302
Tel: (435) 734-3329
Fax: (435) 734-3374

IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR BOX ELDER COUNTY, STATE OF UTAH	
STATE OF UTAH, Plaintiff, vs. ALFREDO GUTIERREZ, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Criminal No. 051100099 Judge Ben H. Hadfield

This matter came before the Court on Defendant's Motion to Suppress evidence seized in the course of a search of Defendant's person and vehicle. The matter came before the Court for oral arguments on August 15, 2005. The State was represented by Deputy County Attorney Brad C. Smith. Defendant was present and represented by Martin Gravis. The Court having reviewed the memoranda and considered the arguments of counsel, now enters the following:

FINDINGS OF FACT

1. On March 6, 2005, the Defendant was lawfully pulled over for traffic violations including speeding and following too close.

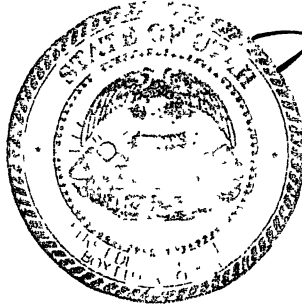
2. While Officer Gerfen contacted the driver, Officer Panter approached on the passenger side of the vehicle and observed an open container of alcohol in plain view.
3. Officer Gerfen subsequently requested consent to search the Defendant's person.
4. Consent was voluntarily given.

CONCLUSIONS OF LAW

1. Under State v. O'Brien, 959 P.2d 647, 649-50 (Utah Ct. App. 1998), the officers had probable cause for arrest based on the open container seen in the vehicle.
2. In the alternative, upon discovery of an open container, the officers had an obligation to investigate further to determine whether the Defendant was impaired or otherwise a danger to the community.
3. Officer Gerfen's request for consent was justified under the law based on his discovery of the open container of alcohol and need to dispel any fear that the Defendant may have posed a danger to other members of the community.
4. Defendant's argument that his arrest was illegal under Utah Code Ann. § 41-6-166 is rendered moot by the officers' discovery of methamphetamine on Defendant's person. The discovery of methamphetamine pursuant to a lawful search was a legitimate basis for arrest.

5. Defendant's motion to suppress is hereby denied.

DATED this ^{Oct.}17 day of ~~September~~, 2005.

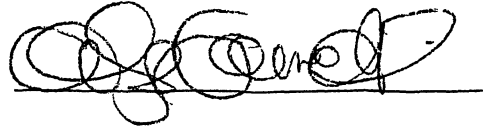


J. H. Hedfield
DISTRICT JUDGE

Certificate of Mailing

I hereby certify that on this 31 day of ~~September~~^{August}, 2005, I mailed, postage prepaid, a true and correct copy of the foregoing Proposed Findings of Fact and Conclusions of Law, to the following individual:

Martin V. Gravis
2562 Washington Blvd.
Ogden, UT 84401



Rule 7 Notice

Pursuant to Utah R. Civ. P. 7(f)(2), the undersigned will submit the foregoing Findings of Fact and Conclusions of Law to Judge Hadfield of the First Judicial District Court of Box Elder County, for signature, upon the expiration of eight (8) days from 31 August 2005, unless written objection is filed prior to that time

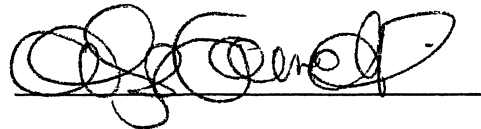


Benjamin C Rasmussen
Deputy County Attorney

Certificate of Mailing

I hereby certify that on this 31 day of ~~September~~^{August}, 2005, I mailed, postage prepaid, a true and correct copy of the foregoing Proposed Findings of Fact and Conclusions of Law, to the following individual:

Martin V. Gravis
2562 Washington Blvd.
Ogden, UT 84401



Rule 7 Notice

Pursuant to Utah R. Civ. P. 7(f)(2), the undersigned will submit the foregoing Findings of Fact and Conclusions of Law to Judge Hadfield of the First Judicial District Court of Box Elder County, for signature, upon the expiration of eight (8) days from 31 August 2005, unless written objection is filed prior to that time



Benjamin C Rasmussen
Deputy County Attorney

Tab 9

EXHIBIT 9
(Order on Motion for Rehearing or Motion to Suppress and Stay Entry of
Findings of Facts)

Martin V. Gravis #1237
Attorney for Defendant
2562 Washington Blvd.
Ogden, Utah 84401
Telephone: 392-8231

IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY,
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

Alfredo Gutierrez,

Defendant.

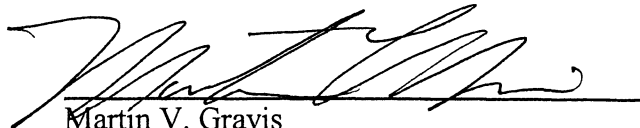
MOTION FOR REHEARING OR MOTION
TO SUPPRESS AND TO STAY ENTRY OF
FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER

Case No.051100099

Judge: Ben H. Hadfield

COMES NOW Defendant, by and through his Attorney of record, Martin V. Gravis, and hereby moves the above entitled Court for a rehearing on Defendant's Motion to Suppress and to Stay Entry of Findings of Fact and Conclusions of Law. Said Motion is based upon the Court's Conclusion of Law Number 1 and the fact that the Court determined at the suppression hearing that it was unnecessary for the Court to rule on the issue as to whether said arrest would have been legal under Utah Code Annotated 41-6-166.

DATED THIS 19 DAY OF OCTOBER 2005



Martin V. Gravis
Attorney at Law

ORDER

Based upon the foregoing Motion it is hereby ordered that a rehearing on Defendant's Motion to Suppress be held on the 7th day of November, 2005 at 1:30 p.m., and the entry of the Findings of Fact and Conclusions of Law be stayed until said hearing.

Dated this ____ day of October, 2005

BY THE COURT:

Denied *BSH*

Ben H. Hadfield
JUDGE, District Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, MOTION FOR REHEARING OR MOTION TO SUPPRESS AND TO STAY ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER, via First-Class Mail, Postage Prepaid this ____ day of October, 2005 to:

Amy F. Hugie
Box Elder County Attorney
01 South Main Street
Brigham City Utah 84302

Licki D...
SECRETARY